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IN THE

# Supreme Court of the United States

HEATHCLIFFE JOHN BRADLEY,

*Petitioner,*

v.

ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioner, a citizen of New Zealand who entered the United States under the Visa Waiver Program ("VWP"), applied for lawful permanent residence as an immediate relative spouse of an American citizen before any action to remove him had been taken. Pursuant to 8 U.S.C. § 1187(b), a VWP entrant must waive the right to contest any action for removal on any basis other than asylum. However, 8 U.S.C. § 1255(c)(4) permits a VWP entrant who is an immediate relative of an American citizen to adjust status and 8 U.S.C. § 1255(c)(2) allows an immediate relative to adjust despite certain status violations, including the failure to maintain lawful status. Since 2006, seven Courts of Appeals have ruled that an immediate relative VWP entrant may only adjust status during the first ninety days after entry while the entrant maintains legal status. Following the Third Circuit's decision below in *Bradley v. Attorney General*, No. 08-4184, 2010 WL 1610597, (3d Cir. Apr. 22, 2010), the Government has halted the adjudication of these applications nationwide, threatening spouses of American citizens with summary removal. Petitioner seeks certiorari to review the following questions:

1. Whether an immediate relative VWP entrant may adjust his status to that of a person admitted for lawful permanent residence despite overstaying the ninety day period allotted for such entrants, so long as the application is filed prior to the initiation of any action to remove him and thus not to contest any action for removal; and

2. Whether the general authority to remove a VWP alien without a hearing pursuant to 8 U.S.C. § 1187(b) permits Petitioner's summary removal without a hearing or right to renew the application before an immigration judge notwithstanding the specific provisions of 8 U.S.C. § 1255(c)(2) and (4), which allow for the adjudication of an application for adjustment of status filed by an immediate relative spouse of an American citizen despite a VWP entry and despite overstay and violation of status?

## PARTIES TO THE PROCEEDING

Petitioner is Heathcliffe John Bradley, petitioner below.

Respondent is the Attorney General of the United States, respondent below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals on petition for review (App. A, *infra*) is reported at __ F.3d __, 2010 WL 1610597 (3d Cir. April 22, 2010). The decision of the Court of Appeals denying a rehearing by panel and *en banc* (App. D, *infra*), is unreported.

## JURISDICTION

The judgment of the court of appeals denying the petition for review was entered on April 22, 2010. App., *infra*, 1a. The judgment of the court of appeals denying a rehearing by panel and *en banc* was entered on June 21, 2010. App., *infra*, 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

8 U.S.C. § 1187(b)

An alien may not be provided a waiver under the program unless the alien has waived any right –

(1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

8 U.S.C. § 1255(c)

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) [regarding eligibility for adjustment of status] shall not be applicable to –

***

(2) . . . an alien (other than an immediate relative . . . who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; [or]

***

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under . . . section 217.

## STATEMENT OF THE CASE

This case involves the Government's efforts to remove Petitioner, Heathcliffe John Bradley, a citizen of New Zealand married to an American citizen, from

the United States without a hearing in accordance with the provisions of the Visa Waiver Program ("VWP"), as set forth at 8 U.S.C. § 1187. Petitioner maintains that as an "immediate relative" (defined at 8 U.S.C. § 1151(b)(2)(A)(i) to include the spouse of an American citizen), he is eligible to adjust his status despite overstaying the ninety-day time period allotted by the VWP pursuant to 8 U.S.C. § 1255(c)(2) and (4).

**A. The Visa Waiver Program**

Established in 1986, the Visa Waiver Pilot Program ("VWPP") – now the VWP – was established "to determine if a visa waiver provision could facilitate international travel and promote the more effective use of the resources of affected government agencies . . ." Visa Waiver Pilot Program, 53 Fed. Reg. 24,898, 24,898 (June 30, 1988). The VWP now permits eligible nationals of thirty-six designated countries, including New Zealand, to enter the United States without a visa for a ninety-day period for the purpose of tourism or business. *See* 8 U.S.C. § 1187; 8 C.F.R. § 217.2(b). However, a VWP entrant is statutorily required to waive any right to contest any action for removal, except on the basis of asylum, by executing a Form I-94W upon arrival.[1] 8 U.S.C. § 1187(b); 8 C.F.R. § 217.2(b)(1). The integrity of the program is preserved because the

1. Under the Electronic System for Travel Authorization ("ESTA"), potential VWP entrants are now required to complete the Form I-94W online and receive travel authorization prior to traveling to the United States. *See* The Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program, 73 Fed. Reg. 67,354 (Nov. 13, 2008).

number of overstays is limited by 8 U.S.C. § 1187(c)(3)(A), which provides that a VWP designated country will not receive redesignation if the total number of nationals of that country who were admitted as non-immigrant visitors during the previous fiscal year and who violated the terms of admission exceeds two percent of the total number of nationals of that country who applied for admission as non-immigrant visitors during the previous fiscal year.

**B. Factual Background**

Petitioner, Heathcliffe John Bradley, a native and citizen of New Zealand, was inspected and admitted into the United States on August 28, 1996 without a valid non-immigrant visa pursuant to the VWP, although the Government has been unable to produce Petitioner's signed Form I-94W evidencing a waiver. Pet. App. A at 3a-4a.

On July 29, 2006, Petitioner married an American citizen, Cheryl Losee. *Id.* at 4a. Petitioner thereafter sought an adjustment of status to that of a lawful permanent resident based on his marriage. *Id.* at 4a-5a. However, after his request to reschedule his adjustment interview with United States Citizenship and Immigration Services ("USCIS") was denied, so too was his adjustment application without any consideration on the merits. *Id.* at 5a or Pet. App. C at 20a-23a. On October 8, 2008, the Government detained Petitioner for thirty-seven days and ordered him removed without a hearing from the United States. *Id.* at 5a or Pet. App. B at 19a. Petitioner filed a Petition

for Review in the United States Court of Appeals for the Third Circuit. *Id.* at 5a.

### C. Procedural Background

Because VWP entrants must waive any right to contest any action for removal, other than on the basis of asylum, Petitioner's only recourse was to challenge the constitutionality of his summary removal order by petitioning the United States Court of Appeals for the Third Circuit for review pursuant to 8 U.S.C. § 1252(a)(1) and (a)(2)(D).

On April 22, 2010, the Third Circuit denied Petitioner's Petition for Review. In its decision, the Court first presumed that Petitioner had completed and signed a Form I-94W on entry, relying on the unsigned portion of an I-94W form, Petitioner's admittedly "vague" statement that he may have completed some form on arrival, and the presumption of regularity. Pet. App. A at 8a. Next, the Court decided that even if the waiver was not executed knowingly and voluntarily, Petitioner could not establish substantial prejudice arising out of his alleged due process violation – apparently his unknowing waiver of constitutional rights. *Id.* at 9a-10a-14a. Finally, the Court held that a VWP entrant "may not, after the expiration of his 90-day stay, adjust his status as a defense to removal." *Id.* at 16a. The Court's decision to limit VWP entrant adjustments to the first ninety days brought the Third Circuit in line with six other federal Courts of Appeals.

Petitioner's Petition for Rehearing by Panel and *En Banc* was summarily denied on June 21, 2010.

## REASONS FOR GRANTING THE PETITION

Despite the fairly recent trend set by seven Courts of Appeals in deciding this issue over the course of the last four years, the Government has largely adhered to its longstanding and completely different policy of adjudicating the adjustment applications of immediate relative VWP overstays. This policy, however, has been inconsistently applied nationwide, leading to considerable confusion and the occasional, seemingly random removal of VWP entrants, despite only the most minimal status violations and despite their status as spouses of American citizens. When a VWP overstay is removed, several bars to reentering the United States are automatically triggered subjecting them to upwards of fifteen years of inadmissibility.

The Third Circuit, and six other Courts of Appeals, would limit the statutory eligibility of applying for an adjustment of status to immediate relative VWP entrants *only* within the first ninety days after entry. This rule is based on a misinterpretation of the plain language of the pertinent statutes and a disregard for the principles of statutory construction, the family unity policy underlying immigration laws, and the legislative intent. We maintain that the three relevant provisions – 8 U.S.C. §§ 1187(b) and 1255(c)(2) and (4) – are properly read together to afford an immediate relative VWP entrant the ability to seek adjustment, regardless of certain status violations and the date of the filing, as long as the application pre-dates any action for removal.

Where an application has been denied after an action for removal has been initiated, the applicant should retain certain procedural protections, including the right to renew his application before an immigration judge in accordance with 8 C.F.R. § 245.2(a)(5).

## I. THE THIRD CIRCUIT DECIDED AN IMPORTANT AND FREQUENTLY-RECURRING QUESTION OF FEDERAL IMMIGRATION LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT

In recent years, the questions presented by this case have recurred with increased frequency owing to the Government's inconsistent application of its own policy as well as judicial precedents when adjudicating immediate relative VWP overstay adjustment applications. Throughout the twenty-four year history of the VWPP and VWP, the vast majority of immediate relative VWP entrant adjustment applicants have been granted adjustments of status. However, USCIS has occasionally refused to adjudicate certain applications and many American citizens and their VWP entrant spouses have faced the breakup of their families in recent years as a result. Eight immediate relative VWP entrant adjustment cases, including Petitioner's, have been decided in the United States Courts of Appeals since 2006. *See Schmitt v. Maurer*, 415 F.3d 1092, 1097 (10th Cir. 2006) (holding that "[t]he statutes authorize two different results only when an alien overstays his visa *and is ordered removed before* the alien files a petition for adjustment of status) (emphasis added); *Ferry v. Gonzales*, 457 F.3d 1117, 1127-28 (10th Cir. 2006)

(holding that a VWP entrant who overstays, attempts to adjust status, and is ordered removed, has waived the right to contest the removal order through a renewed application, although the VWP entrant here was also removable on other grounds); *Lacey v. Gonzales*, 499 F.3d 514, 519 (6th Cir. 2007) (same); *Zine v. Mukasey*, 517 F.3d 535, 543 (8th Cir. 2008) (agreeing with *Ferry* and *Lacey* where VWP entrant was a citizen of a non-VWP country who entered with a fraudulent passport); *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008) (limiting the Ninth Circuit's previous decision in *Freeman v. Gonzales*, 444 F.3d 1031, 1095 (9th Cir. 2006), which permitted a VWP entrant to adjust, to apply only during the first ninety days); *McCarthy v. Mukasey*, 555 F.3d 459, 461-62 (5th Cir. 2009) (joining other Circuits); *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (*en banc*) (same, in another case of a non-citizen VWP entrant who entered using a fraudulent passport). The increase in recent litigation strongly suggests that the Government's unpredictability has become problematic and that the issue is frequently recurring.

The Courts of Appeals, which began issuing decisions on the questions presented more than four years ago, have largely agreed on the ninety-day limitation on immediate relative VWP entrant adjustments of status. *Id.* For more than four years, however, USCIS has largely, though inconsistently, continued its policy of adjudicating and granting such applications. Adjudications continued in the Ninth Circuit even after the ninety-day limitation was imposed by the troubling *Momeni* decision in 2008. In Las Vegas, for example, United States Immigration and Customs Enforcement ("ICE") agreed to wait for USCIS to

adjudicate an adjustment application and only sought removal if the application was denied for reasons unrelated to the VWP entrance. *See* M. Mercedes Badia-Tavas, Melissa Harms, and Leslie Jewell, Momeni v. Chertoff *and Related Case Law: Can Visa Waiver Clients Still Marry and Adjust?*, Immigration & Nationality Law Handbook 873 (2009-10 ed.). In Sacramento and Los Angeles, USCIS district offices continued to adjudicate adjustment applications filed outside the ninety-day period. *Id.* The procedure was reportedly similar in the Sixth Circuit field offices in Ohio and Michigan, as well as in the Seventh Circuit Chicago field office. *Id.*

Most recently, following the *Bradley* decision, USCIS has apparently halted the adjudication of adjustment applications, leaving large numbers of American citizens and their non-citizen family members in limbo. *See, e.g.*, Nina Bernstein, *Strict Reading of Visa Rule Trips Up More Couples*, N.Y. Times, May 14, 2010. ("Until now, even in states in other circuits that have issued similar rulings, immigration authorities have generally used the more-lenient law and their discretion to approve such cases, rather than order deportation, immigration lawyers say.") Lawyers claim that there are "thousands of couples who could be adversely affected by the [*Bradley*] decision..." *Id.* Yet despite the apparent freeze on adjudications, the Government's inconsistent practices continue. In the post-*Bradley* Third Circuit, an adjustment of status was approved in the high-profile case of dual German and British citizen Karsten Van Sander.

For several years, the Government has largely disregarded the fairly consistent opinions of seven Courts of Appeals, perhaps because it perceives the Courts' rule as incorrect, and has continued to adjudicate the adjustment applications of immediate relative VWP overstays. Periodically, however, the Government refuses to adjudicate an application, seemingly at random. The Government's inconsistent practices continue to jeopardize the marriages of thousands of American citizens and their VWP entrant spouses nationwide, who are merely seeking to legalize their status after extremely minor violations of immigration law. Because the issue has remained unresolved despite the intervention of seven Courts of Appeals and despite a period of uncertainty lasting for more than four years, the questions presented are nationally important, frequently-recurring, and in need of the attention of this Court.

## II. THE THIRD CIRCUIT'S DECISION IS INCORRECT ON THE MERITS

### A. The Third Circuit's Decision Disregards the Plain Language of the Pertinent Statutes

The VWP statute states that an alien must waive any right "to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b). Taken together with 8 U.S.C. § 1255(c)(4), which expressly permits immediate relative VWP entrants to seek adjustment, and *completely disregarding* 8 U.S.C. § 1255(c)(2), which allows immediate relative aliens to seek adjustment despite

certain status violations, the Third Circuit below ruled that Petitioner "may not, after the expiration of his ninety-day stay, adjust his status as a defense to removal." Pet. App. 16a at 18. The Court incorporated the Seventh Circuit's reasoning in *Bayo*, which suggests that an application submitted within the first ninety days of a VWP entrant's stay would not represent an objection to removal while an application submitted thereafter would constitute a challenge to removal. 593 F.3d at 507. But the plain language of the statute imposes no such ninety-day limitation on VWP entrants, and if Congress had intended such a result, it could have easily expressed this desire. Instead, a straightforward reading of the language produces a more plausible rule.

With respect to 8 U.S.C. § 1187(b), Petitioner's adjustment application did not represent an attempt "to contest . . . any action for removal." In certain circumstances, such as in the pursuit of an adjustment of status application in conjunction with cancellation of removal pursuant to 8 U.S.C. § 1229b, an adjustment application would constitute a challenge to removal. In other situations, an adjustment of status can be achieved without the existence of removal proceedings, such as through diversity immigrant visas, *see* 8 U.S.C. § 1153(c), employment-based immigrant visas, *see* 8 U.S.C. § 1153(b), and family-based immigrant visas, *see* 8 U.S.C. § 1153(a). In the latter cases, an adjustment of status acts as a procedural mechanism that permits individuals to obtain immigrant status without the inconvenience of having to depart from the U.S. and begin processing abroad. Petitioner's application for adjustment belongs in the latter category, as he proactively filed for an adjustment based on his immediate relative status

before any attempts to remove him began. In short, Petitioner's application cannot be considered a *challenge to removal* because at the time it was filed no action for removal existed.

Given that Petitioner's waiver of rights did not become operational when he filed his adjustment application, his situation should be governed instead by 8 U.S.C. § 1255(c)(4), which permits immediate relative VWP entrants to seek adjustment, and (c)(2), which expressly grants an immediate relative alien the right to seek adjustment, despite accepting unauthorized employment and *despite failing to maintain continuously a lawful status since entry*. Read together, the three provisions plainly suggest that an immediate relative VWP overstay is *statutorily eligible* to seek adjustment, regardless of certain status violations and the date of the filing, as long as the application *pre-dates* any action for removal. Thus, Petitioner, who proactively filed an application prior to the issuance of an order of removal against him, should be eligible for adjustment despite his status violations.

Prior to aligning itself with the numerous Courts of Appeals, which had adopted the ninety-day limitation, the Ninth Circuit in *Freeman* offered a workable extension to the plain language rule proposed by Petitioner: "[O]nce a VWP entrant files an adjustment of status application as an immediate relative, as contemplated by 8 U.S.C. § 1255(c)(4), the alien is entitled to the procedural guarantees of the adjustment of status regime, *see* 8 C.F.R. § 245.2, and to that extent is no longer subject to the Visa Waiver Program's no-contest clause." 444 F.3d at 1033 (limited by *Momeni*, a

short decision that failed to account for 8 U.S.C. § 1255(2)(c), proclaiming that immediate relatives who entered under VWP can *only* adjust within the first ninety days while in *valid status*). The *Freeman* Court, in an exhaustive and well reasoned decision, correctly suggested that an adjustment applicant retains the right to renew his application if it has been denied pursuant to 8 C.F.R. § 245.2(a)(5), and if a renewal occurs after an action for removal has been initiated, an immigration judge rather than a district director should review and rule on the application. *Id.* at 1035. Under this rule, after Petitioner's initial application was denied and the Government sought to remove him, his reapplication should have qualified him for the procedural guarantees set forth in the Code of Federal Regulations and described by the *Freeman* Court.

### B. A Principle Of Statutory Construction States That Specific Provisions Prevail Over General Provisions

It is a well-established canon of statutory interpretation that where two provisions appear to conflict, the particular provision should prevail over the general provision. *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Busic v. United States*, 446 U.S. 398, 406 (1980) (discussing "the principle that a more specific statute will be given precedence over a more general one"); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (holding that Congress' specific determination that habeas corpus is the appropriate remedy for state prisoners attacking the validity of their confinement

must prevail over the general terms of 42 U.S.C. § 1983). "The rationale for this canon is that a general provision should not be applied 'when doing so would undermine limitations created by a more specific provision.'" *Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001) (citing *Varity v. Howe*, 516 U.S. 489, 511 (1996)).

When Congress enacted the VWP, it created a general prohibition preventing VWP entrants from challenging removal on any basis other than asylum. *See* 8 U.S.C. § 1187(b). However, Congress also expressly indicated that VWP entrants who are immediate relatives are permitted to adjust their status without restriction. 8 U.S.C. § 1255(c)(4). Specifically, Congress carved out an exception for immediate relatives permitting these special class of immigrants from favorite nations to adjust their status despite minor immigration violations including accepting unauthorized employment and failing to maintain lawful status since entry. 8 U.S.C. § 1255(c)(2). If the above provisions are read to present a conflict, the latter provisions, dealing with the specific plight of immediate relatives of American citizens, should accordingly prevail over the general ban on challenges to removal.

### C. The Third Circuit's Decision Fails To Adhere To The Principle Of Construing Ambiguities In Deportation Statutes In Favor Of The Alien

In immigration law, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-*

*Fonseca*, 480 U.S. 421, 449 (1987)). Just as ambiguities should be interpreted in favor of the accused in the criminal context, ambiguities, if they exist, in the deportation context should be interpreted in favor of the alien. The principle reflects the understanding that "[d]eportation is always a harsh measure." *Cardoza-Fonseca*, 480 U.S. at 449; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction before deportation is a drastic measure and at times the equivalent of banishment of exile. It is in the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.") As this case directly involves the interpretation of a deportation statute, specifically the summary removal provisions of 8 U.S.C. § 1187(b), the rule of lenity is applicable and should resolve any potential ambiguities in favor of the alien.

A rule that permits an adjustment application filed by an immediate relative VWP entrant to be adjudicated as long as it was filed before any action for removal has been initiated and without regard to whether it was filed within ninety days of the VWP entry would be in keeping with the spirit of the rule of lenity.

### D. The Third Circuit's Decision Creates A Rule That Practically Nullifies The Purported Purpose of 8 U.S.C. § 1255(c)(4)

In practice, the rule announced by the Third Circuit defies logic. A rule permitting immediate relative VWP entrants to adjust only during the first ninety days fails to recognize that anyone attempting to adjust so soon after arriving in the United States likely entered with

impermissible immigrant intent in violation of 8 U.S.C. § 1182(a)(6)(C)(i), which provides that any alien who willfully misrepresents a material fact in procuring admission to the United States is inadmissible. Any alien who is deemed inadmissible is also ineligible for an adjustment of status. *See* 8 U.S.C. § 1255(a)(2).

While it does not have the force of law, the Foreign Affairs Manual ("FAM"), which sets forth the basic organizational directive of the Department of State, *see* 1 FAM 011.1(a), provides some insight into the Government's policies on misrepresentation. The FAM states that if an alien marries and seeks an adjustment of status within thirty days of entry, Government officials may presume that the applicant misrepresented his or her intention in seeking entry into the United States in violation of 8 U.S.C. § 1182(a)(6)(C)(i). *See* 9 FAM 40.63 n.4.7-2. If an alien seeks an adjustment of status between thirty and sixty days after entry, the alien's intent may still be scrutinized for misrepresentation. *See* 9 FAM 40.63 n.4.7-3. Only an alien who marries between sixty and ninety days following entry will not be subject to inquiry. *See* 9 FAM 40.63 n.4.7-4.

The issue of impermissible intent at the time of entry has also been problematic in the only VWP entrant case we were able to discover in which the applicant was deemed eligible to adjust. In *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the Ninth Circuit permitted an alien who filed within the ninety day period to seek an adjustment of status. On remand, however, the Court held that the alien, who was married to a U.S. citizen at the time of her VWP entry, had entered with non-immigrant intent and thereby misused the VWP. *In re*

*Freeman*, 489 F.3d 966, 969 (9th Cir. 2007). The alien's adjustment application was ultimately denied. *Id.* In practice, therefore, the Third Circuit's ruling comes close to nullifying what the Court purports is the function and purpose of 8 U.S.C. § 1255(c)(4).

Furthermore, the Third Circuit's ruling is illogical in that it requires the summary removal of immediate relative VWP overstays while 8 U.S.C. § 1255(c)(2) apparently permits all other immediate relatives with certain violations of status to apply for adjustment. As the Ninth Circuit stated in *Freeman*, "having granted VWP visitors the right to seek an adjustment of status, it makes no sense for Congress to have intended that these preferred visitors – by definition, citizens of certain favored countries – should have second-class status once they enter into the adjustment of status process." 444 F.3d at 1035 (referencing *Crandal v. Ball, Ball & Brosamer*, 99 F.3d 907, 910 (9th Cir. 1996) ("A statute should be read in a manner which attribute[s] a rational purpose to the legislature.")) Among the sever consequences of the decision is the fact that Petitioner becomes subject to a host of periods of inadmissibility including a a five year bar from reentering for being removed from the United States under 8 U.S.C. §§ 1182(a)(9)(A)(i) and (ii).[2]

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2. Although the five year inadmissibility bar for being removed from the United States may be waived by the Attorney General or USCIS under 8 U.S.C. §1182(a)(9)(A)(iii), the Petitioner and his American spouse will be separated for months, if not years, waiting outside of the United States for the issuance of the immigrant visa and grant of the waiver. This undermines the legislative intent and design to *specifically* allow immediate relatives (spouses of American citizens) to adjust their status in the United States notwithstanding their entry under the VWP or for that matter, failure to maintain legal status under 8 U.S.C. §§ 1255(c)(2) and (4).

Most VWP entrants, like Petitioner, are non-criminals from "favored countries" who entered the United States legally, yet the Third Circuit's ruling would make it more difficult for such individuals to remain in the United States with their American citizen spouses than certain aliens who entered the United States illegally. For example, aliens who, by fraud or willful misrepresentation of a material fact, procure a visa or other documentation to enter the United States, enjoy more procedural rights than a VWP entrant. *See* 8 U.S.C. § 1182(i)(waiver available *in* the United States for violation of 8 U.S.C. § 1182(a)(6)(C)(i)).

### E. The Third Circuit's Decision Is Inconsistent With The Policies Underlying Immigration Laws and the Legislative Intent

One of the primary goals of American immigration law policy is family unity. *See, e.g., Robinson v. Napolitano*, 554 F.3d 358, 367 (3d Cir. 2009) ("[T]he core purpose of the U.S. family-based immigration policy [is] the promotion of family unification for U.S. citizens and lawful permanent residents." *Id.* (referencing Act to Amend the Immigration and Nationality Act, Pub.L. 89-236, § 1, 79 Stat. at 911 (codified as amended at 8 U.S.C. § 1151(b)(2)(A)(i); H.R.Rep. No. 89-745 at 1, 12 (1965)); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units . . ."). Congress has expressly granted U.S. citizens the right to petition for their spouses and

children, excluding most hardships that may arise from the immigration laws. H.R.Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), U.S. Code Cong. & Admin. News 1957, p.202. Even former President Bush himself, who, in urging an extension of remedial immigration legislation, explained that, "I am a strong proponent of government policies that recognize the importance of families and that help to strengthen them. To the extent possible, I believe that our immigration policies should reflect that philosophy." 78 *Interpreter Releases* 794 (May 7, 2001).

In holding that an immediate relative VWP entrant who overstays cannot adjust his status, the Third Circuit has disregarded the family unity policy underlying America's immigration laws and threatens to break up the families formed by American citizens and citizens of "favored countries" simply because the latter has overstayed *even for one day.* This result is unconscionable and simply ignores the foundation on which America's immigration policy is built on – family unification. As discussed above, in most situations, the family unity policy permits an immediate relative of an American citizen to remain with his family in the United States, despite certain minor status violations. *See* 8 U.S.C. § 1255(c)(2). The Third Circuit has offered no explanation as to why this policy does not compel a more favorable reading of 8 U.S.C. §§ 1187(b) and 1255(c)(2) and (4).

Among the specific goals of the VWP was to produce "cost savings for the Department of State which could reduce its staff overseas" from friendly nations, where visa fraud is almost non-existent, and transfer consulate officials to more problematic posts around the world.

*Waiver of Nonimmigrant Visa Requirements: Hearing Before the Subcomm. On Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 96th Cong. 1-2 (1980) (statement of Rep. Holtzman, Chairwoman, House Subcomm. on Immigration, Refugees, and International Law). Yet prohibiting immediate relative VWP overstays from adjusting fails, at a minimum, to further the goal of cost savings. American taxpayers fund the cost of a removed alien's flight to the country of removal as well as any costs of detention, which run approximately $141 per night. *See The Math of Immigration Detention*, National Immigration Forum, July 7, 2009, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf (citing Michelle Roberts, *Immigrants Face Lengthy Detention with Few Rights*) (statistics based on the amount budgeted for the 2009 fiscal year).

Here, the taxpayers have already paid a total of approximately $5,217 to detain Petitioner for thirty-seven nights and could yet fund the cost of his return ticket to his native New Zealand. Conversely, the cost of reviewing and granting an adjustment petition is covered by the applicant and does allow for cost savings. (The fee for submitting a Form I-485 Application to Register Permanent Residence or Adjust Status is now $1,010 and the fee for a Form I-130 Petition for Alien Relative is $355. "Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule," 72 Fed. Reg. 4888, (Feb. 1, 2007) (amending 8 C.F.R. § 103).

The Third Circuit's decision is evidently contrary to the legislative intent of enacting the VWP as it pertains to cost savings. But more importantly, this decision undermines another important legislative purpose, which is to allow the U.S. Department of State to strategically allocate scarce consulate resources, considered America's outer layer of national defense, from less problematic posts located at VWP countries to posts where there is a high rate of fraud. Thus, tracking the reasoning of its sister circuits, the Third Circuit not only ignores almost three decades of Government policy and procedure in adjusting VWP immediate relatives overstays but also creates a potentially perilous precedent warranting this Court's review.

## CONCLUSION

A fundamental disagreement exists between seven Courts of Appeals, who would forbid the adjudication of an adjustment of status application filed by an immediate relative VWP overstay, and the Government, who has traditionally exhibited a willingness to grant adjustments to such individuals. While the rule forged by the Courts of Appeals is plagued by error, the Government has responded to the split of opinions by continuing to adjudicate the majority of applications while randomly refusing to adjudicate others. As a result, thousands of marriages between American citizens and their VWP entrant spouses have been jeopardized by the threat of the unduly harsh punishment of removal of the immediate relative for minor status violations.

Petitioner respectfully requests that this Court grant his petition for writ of certiorari to address the questions presented, which affect not only him but thousands of others nationwide.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 22, 2010**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No. 08-4184

HEATHCLIFFE JOHN BRADLEY,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Review of an Administrative Order of Removal of the Department of Homeland Security Ordering Removal pursuant to 8 U.S.C. § 1187 (A87-074-865)

Argued March 11, 2010

Before: AMBRO, SMITH and ALDISERT,
*Circuit Judges*
(Filed: April 22, 2010)

*Appendix A*

## OPINION OF THE COURT

ALDISERT, Circuit Judge.

Petitioner Heathcliffe John Bradley, a citizen and national of New Zealand, seeks review of a final removal order of the Department of Homeland Security, Immigration and Customs Enforcement ("the Department"). Bradley contends that the Department's removal order is void under Woodby v. INS, 385 U.S. 276, 286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966), because the record lacks "clear, unequivocal, and convincing evidence" that he waived his right to contest his removal under the Visa Waiver Program ("VWP"), 8 U.S.C. § 1187. Bradley additionally contends that he did not validly waive his right to contest his removal under the VWP because his waiver was not "knowing and voluntary." Finally, Bradley contends that, notwithstanding any VWP waiver, he may renew his application for a marriage-based adjustment of status before an immigration judge. See 8 U.S.C. § 1255(c)(4). For the reasons that follow, we will deny his petition.[1]

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1. We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(1), which permits us to review final orders of removal. Although some courts have suggested that 8 U.S.C. § 1187(b)(2) narrows our jurisdiction to review removal orders involving VWP entrants, see, e.g., Lacey v. Gonzales, 499 F.3d 514, 519 (6th Cir. 2007), we view § 1187(b)(2) as a substantive, rather than a jurisdictional, bar to a VWP entrant's ability to obtain relief from removal. In particular, § 1187(b)(2) does not appear to abrogate 8 U.S.C. § 1252(a)(2)(D), which provides that

(Cont'd)

*Appendix A*

I.

Bradley arrived in the United States on August 28, 1996 without a valid non-immigrant visa, but was admitted under the VWP. Bradley represents that he was intoxicated when he arrived, and he claims to have

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(Cont'd)

"[n]othing . . . in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." We are further persuaded that § 1187(b)(2) is not jurisdiction-stripping because it does not clearly and explicitly deprive federal courts of jurisdiction. See Calcano-Martinez v. INS, 533 U.S. 348, 351-352, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001) (concluding that "Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions raising" claims not reviewable by petitions for direct review). Compare 8 U.S.C. § 1187(b)(2) (providing that a VWP entrant must "waive any right . . . to contest . . . any action for removal"), with, e.g., 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review . . . ."), 8 U.S.C. § 1252(a)(2)(A),(B) (same), and 8 U.S.C. § 1252(a)(5) ("For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review . . . and review pursuant to any other provision of law (statutory or nonstatutory)."). In view of the "strong presumption in favor of judicial review of administrative action," INS v. St. Cyr, 533 U.S. 289, 298, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), we do not believe that § 1187(b)(2) affects our jurisdiction to consider Bradley's claims. As we will explain, however, § 1187(b)(2) has a significant effect on Bradley's ability to pursue substantive relief from removal.

little recollection of his admission. Nevertheless, Bradley's declaration establishes that, after his arrival, he signed a form, presented that form to a customs officer, and was admitted into the United States. According to Bradley,

> [u]pon my arrival at John F. Kennedy International Airport in New York, I was given a form to complete, which I vaguely recall completing or even signing for that matter. . . . I handed the form to the Custom's agent, who waived me through after taking a part of my form, without any questions.

(Bradley Decl. ¶¶ 18, 20 (errors in original).) According to his Form I-94W Departure Record, Bradley was authorized to remain in the United States for the 90-day period ending November 27, 1996. (App. [2] 8.) It is undisputed that Bradley remained in the United States beyond his authorized stay, and that he remains here still.

On July 29, 2006, Bradley married Cheryl Losee, a United States citizen. In December 2007 and with the assistance of an attorney, Bradley and Losee applied to United States Citizenship and Immigration Services to adjust Bradley's status to that of a lawful permanent resident. In conjunction with that application, Bradley's wife filed an I-130 immediate-relative visa petition, a

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2. "App." refers to the petitioner's appendix, while "Resp't App." refers to the respondent's appendix.

prerequisite to obtaining a marriage-based adjustment of status. That petition was denied pursuant to 8 C.F.R. § 103.2(b)(13) when Bradley and Losee failed to appear for a scheduled interview.

On October 8, 2008, Bradley was arrested and ordered removed, pursuant to 8 U.S.C. § 1187(b). On October 14, 2008, Bradley filed a Petition for Review in this Court and moved for a stay of removal. On November 10, 2008, we stayed Bradley's removal order, and on November 14, 2008, Bradley was released from incarceration, pending our review.

II.

Before we address Bradley's contentions, we first review the purpose and role of the VWP within our nation's body of immigration law.

Congress established the VWP "'to facilitate international travel and promote the more effective use of the resources of affected government agencies while not posing a threat to the welfare, health, safety, and security of the United States.'" *Nose v. Att'y Gen.*, 993 F.2d 75, 77 n.2 (5th Cir. 1993) (quoting 53 Fed. Reg. 24,898 (1988)). Under the VWP, a qualifying visitor may enter the United States without obtaining a visa, so long as a variety of statutory and regulatory requirements are met. Among other things, a visitor seeking admission under the VWP must execute certain immigration forms, present a passport from a qualifying country, and possess a round-trip ticket. 8 U.S.C. § 1187(a). Once

admitted under the VWP, a visitor may remain in the United States for 90 days. 8 U.S.C. § 1187(a)(1).

Although the VWP affords visitor aliens with great flexibility and convenience, those benefits come at a cost. Most significantly, a VWP visitor must waive his or her right to contest the government's admissibility determinations and removal actions, except that the alien may contest removal actions on the basis of asylum.[3] 8 U.S.C. § 1187(a)-(b). Accordingly, a VWP applicant must, prior to admission, present U.S. officers with a "completed, signed Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form," 8 C.F.R. § 217.2(b)(1), expressly waiving, inter alia, any "right. . . to contest, other than on the basis of an application for asylum, any action for removal of the alien." 8 U.S.C. § 1187(b)(2). This requirement is ironclad. Indeed, a VWP applicant "may not be provided a waiver under the program unless" the alien has signed a VWP waiver,

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3. The VWP's waiver provision states:

> An alien may not be provided a waiver under the program unless the alien has waived any right—
>
> (1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or
>
> (2) to contest, other than on the basis of an application for asylum, any action for removal against the alien.

8 U.S.C. § 1187(b).

id., and an applicant who does not sign will be refused admission and removed, see 8 C.F.R. § 217.4(a)(1).

For a VWP entrant, the effects of this no-contest provision are severe. A VWP entrant waives the right to assert any non-asylum objection to his removal. 8 U.S.C. § 1187(b)(2). Additionally, unlike the ordinary removal case, a VWP entrant's removal "shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability." 8 C.F.R. § 217.4(b). But as the Court of Appeals for the Ninth Circuit has recognized, given the ease and convenience with which a VWP visitor may enter the United States, the VWP's "linchpin . . . is the waiver, which assures that a person who comes here with a VWP visa will leave on time and will not raise a host of legal and factual claims to impede his removal if he overstays." Handa v. Clark, 401 F.3d 1129, 1135 (9th Cir. 2005). With these precepts in mind, we turn to Bradley's challenge to his VWP waiver.

## III.

We first address Bradley's contention that the Department's removal order is invalid under Woodby v. INS, 385 U.S. at 286, because it was entered without "clear, unequivocal, and convincing evidence" that he waived his due process right to contest his removal. In particular, Bradley contends that because his removal order referred to his VWP waiver, that waiver is a

"ground for deportation," subject to proof by clear, unequivocal and convincing evidence under Woodby. He contends that because the Department failed to produce his signed I-94W form, it has not met its burden of proof, rendering his removal order invalid. We disagree.

Although we doubt Bradley's assumption that the Department must prove his waiver by "clear, unequivocal, and convincing evidence," we hold that the Department has easily met that burden. Bradley admits that he entered the United States under the VWP, and although his declaration is vague, he concedes that he signed a form, presented that form to a customs officer, and was admitted into the United States. (*See* Bradley Decl. ¶¶ 18, 20.) Consistent with that account, the record contains the top portion of a Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form, filled out in handwriting "Bradley, Heathcliffe," date of birth "07 10 72," and stamped with Bradley's admission date of "Nov 27 1996." (App. 8.) Bradley's admissions, together with the documentary evidence, constitute powerful evidence that Bradley signed a Form I-94W, including a waiver of due process rights, before he was admitted to the United States.

This evidence becomes nearly irrefutable in view of the regulations and procedures governing admission under the VWP. Under the regulations, each VWP applicant must present a "completed, signed Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form," 8 C.F.R. § 217.2(b)(1), which contains the VWP waiver (Resp't App. 1). During the admission process

"[t]he departure record at the bottom of the form is retained by the alien, while the immigration official admitting the alien keeps the top portion, including the signed waiver." (Resp't Br. 14 n.8.) Significantly, "an alien may not be provided a waiver under the program unless the alien has waived any right . . . to contest . . . any action for removal," 8 U.S.C. § 1187(b)(2), and any alien who does not sign the VWP waiver will be refused admission, *see* 8 C.F.R. § 217.4(a)(1). Because "agency action . . . is entitled to a presumption of regularity," *McLeod v. INS*, 802 F.2d 89, 95 (3d Cir. 1986), we presume that the Department admitted Bradley under the VWP only after collecting the top portion of his completed I-94W form, including his signed VWP waiver. Although this presumption is rebuttable, *id.*, Bradley has adduced no evidence that the Department admitted him in violation of its own regulations, and in fact, his declaration is entirely consistent with a routine admission under the VWP. We conclude, therefore, that the evidence is more than sufficient to prove Bradley signed a VWP waiver, even assuming that waiver must be proven by "clear, unequivocal, and convincing evidence." As we suggested at oral argument, this contention is underwhelming.

IV.

Bradley next contends that his VWP waiver is invalid because it was not "knowing and voluntary," and he urges us to adopt the "knowing and voluntary" requirement embraced by the Courts of Appeals for the Fifth and Seventh Circuits. *See Bayo v. Napolitano*, 593

F.3d 495, 505 (7th Cir. 2010) (en banc); *Nose v. Att'y Gen.*, 993 F.2d 75, 79 (5th Cir. 1993). Tracking the reasoning of these decisions, Bradley argues that, as with other waivers of constitutional rights, a VWP waiver of due process rights is not constitutionally enforceable unless it is knowing and voluntary. Bradley contends that his specific waiver was not knowing and voluntary because he was intoxicated when he signed it. At the very least, Bradley contends, he is entitled to adjudicate the constitutional validity of his waiver before an immigration judge. We cannot agree.

In all respects, Bradley's claim amounts to a challenge of his removal order under the Due Process Clause of the Fifth Amendment, and consequently, he cannot prevail without "an initial showing of substantial prejudice." *Khan v. Att'y Gen.*, 448 F.3d 226, 236 (3d Cir. 2006) (citation and quotation marks omitted).[4] Thus, even assuming without deciding that Bradley's VWP waiver must be "knowing and voluntary," Bradley cannot invalidate his removal order unless he can demonstrate he was "substantially prejudiced" by his allegedly unknowing waiver. He cannot.

Bradley's prejudice argument is soundly defeated by the cogent reasoning of the *en banc* Court of Appeals for the Seventh Circuit in *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc), a case factually on all fours

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4. See also *Khouzam v. Att'y Gen.*, 549 F.3d 235, 258 (3d Cir. 2008); Wilson v. Ashcroft, 350 F.3d 377, 381 (3d Cir. 2003) (stating the rule in terms of "prejudice").

with this one. There the court reconsidered a panel decision granting petitioner Bayo's petition for review and ordering the Department to conduct a hearing to determine whether his VWP waiver was knowing and voluntary. *Id.* at 507. Although the *en banc* court agreed with the panel's conclusion that a VWP waiver must be knowing and voluntary, it rejected Bayo's due process claim because he could not show prejudice. As the court explained,

> [h]ad he known what the waiver said, Bayo would have had two options, either of which would have led to summary removal. If he had signed the waiver anyway, knowing full well what it said, he would be in the same situation as he is now. If he had refused to sign, he would have been removed summarily at the border because he did not have a proper visa. Perhaps there is a slight chance that after removal, Bayo could have obtained a visa to come to the United States, and then he might have settled in Indiana, met Tatiana Sia, and married her, allowing him to adjust his status based on marriage at that time. As Bayo admits in his brief though, "[i]t is difficult to compare what might have been with what is." This is true, and it is the reason why we find the explanation of how Bayo might have been harmed too speculative to support a showing of prejudice.

*Id.* at 506. Similarly, Bradley cannot show he has been prejudiced by an unknowing or involuntary waiver

because any harm would be too speculative. The consequence he now faces — summary removal — is the same consequence he would have faced had he known of the waiver and refused to sign. He has failed to demonstrate how his knowledge of the waiver realistically could have changed this outcome.

Resisting this conclusion, Bradley urges us to focus our prejudice inquiry not on the time of entry, but on the summary removal resulting from the Department's enforcement of his allegedly unknowing waiver. He contends that his unknowing waiver is prejudicial because it deprives him of his right to contest his removal on the basis of his petition for adjustment of status. This argument fails as well.

Bradley's VWP waiver was an express condition precedent to his 1996 entry to the United States, and he would not have been admitted without it. The prejudice of which he complains — summary removal without a hearing — is a direct consequence of the VWP's congressional design and implementing regulations, and not Bradley's alleged failure to comprehend the terms of his VWP visitor status. *See* 8 C.F.R. § 217.4(b) (providing that removal of a VWP entrant "shall be effected without referral of the alien to an immigration judge for a determination of deportability"). To prevail on his due process claim, Bradley must demonstrate substantial prejudice resulting from the due process violation he has alleged — his unknowing waiver of constitutional rights. Accordingly, Bradley must prove that, but for his

ignorance of the VWP waiver, he could otherwise contest his removal on the basis of his petition for adjustment of status. This, he cannot do. Had Bradley known the contents of the waiver and refused to sign, he would be in the same position as he is now — subject to summary removal without a hearing — and he would not now be eligible to adjust his status on the basis of his marriage to Cheryl Losee. As in Bayo, "the explanation of how [Bradley] might have been harmed [is] too speculative to support a showing of prejudice." Bayo, 593 F.3d at 506.

Likewise, we reject Bradley's contention that, under *Khouzam v. Attorney General*, 549 F.3d 235, 258 (3d Cir. 2008), we should presume substantial prejudice because Bradley received no process at all. Our Court held in Khouzam that a non-VWP petitioner was "inherently" and "substantially prejudiced" by a "complete absence of any process," when the government, without notice or a hearing, terminated the petitioner's deferral of removal under the Convention Against Torture. Id. at 239-240, 258. Distinct from Bradley, however, the petitioner in Khouzam did not waive his due process rights, and no statute conditioned his admission to the United States on an express waiver of these rights. See id. at 235-260. Although a complete denial of process may be inherently prejudicial in most cases, we find no inherent prejudice in the enforcement of an express due process waiver against an alien who has already received the benefit of that waiver. Consequently, in the VWP context, we will require the same showing of "substantial prejudice" required for

other due process challenges to orders of removal. See *Khan*, 448 F.3d at 236. Because Bradley cannot show prejudice, his due process claim does not carry.

V.

Bradley's final argument is that, even if his waiver is valid and enforceable, he is nevertheless entitled to pursue a marriage-based adjustment of status under 8 U.S.C. § 1255(c)(4).[5] He contends that, because 8 U.S.C. § 1255(c)(4) permits VWP entrants to adjust their status on the basis of an "immediate relative" petition,[6] a VWP entrant pursuing such an adjustment is "assimilated to the status of any other alien who has applied for adjustment of status . . . and is not subject to the VWP[] no contest-clause." (Pet'r Br. 33 (*citing Freeman v. Gonzales*, 444 F.3d 1031, 1037 (9th Cir. 2006).) Any other interpretation, he contends, would be

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5. The "adjustment of status" remedy permits the Attorney General, "in his discretion and under such regulations as he may prescribe," to adjust an alien's status to that of a lawful permanent resident if "(1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. § 1255(a).

6. More precisely, 8 U.S.C. § 1255(c)(4) generally makes VWP entrants ineligible for the "adjustment of status" remedy, but carves out an exception for VWP entrants seeking to adjust their status on the basis of an immediate-relative petition. The term "immediate relative" includes the spouse of a U.S. citizen. See 8 U.S.C. § 1151(b)(2)(A)(I).

illogical and would undermine congressional intent to make the adjustment of status remedy available to VWP entrants. Again, he is wrong.

Bradley's position has already been rejected by six of our sister Courts of Appeals, and we now join them in doing the same.[7] As the Court of Appeals for the Seventh Circuit explained in *Bayo*,

> [a]t first glance, it appears that there is a conflict between the adjustment-of-status statute, 8 U.S.C. § 1255(c)(4), and the VWP statute, 8 U.S.C. § 1187(b)(2). Upon closer examination, however, we believe that they can be reconciled. During the time when a nonimmigrant visitor is within the VWP's 90-day window, she may submit an adjustment-of-status application based on an immediate relative. An application submitted at that time would not represent a challenge to removal. After the visitor overstays her 90-day visit, however, the effect of the VWP waiver kicks in, preventing any objection to removal (except for asylum), including one based on adjustment of status.

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7. See Bayo v. Napolitano, 593 F.3d 495, 507 (7th Cir. 2010) (en banc); McCarthy v. Mukasey, 555 F.3d 459, 462 (5th Cir. 2009); Momeni v. Chertoff, 521 F.3d 1094, 1097 (9th Cir. 2008) (narrowing Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006)); Zine v. Mukasey, 517 F.3d 535, 543 (8th Cir. 2008); Lacey v. Gonzales, 499 F.3d 514, 519 (6th Cir. 2007); Schmitt v. Maurer, 451 F.3d 1092, 1097 (10th Cir. 2006).

*Bayo*, 593 F.3d at 507. We agree and hold that, although Bradley was once statutorily eligible under 8 U.S.C. § 1255(c)(4) for the adjustment he now seeks, he may not, after the expiration of his 90-day stay, adjust his status as a defense to removal. Bradley's VWP waiver squarely forecloses him from contesting his removal on this basis.

Contrary to Bradley's contention, the decision of the Ninth Circuit Court of Appeals in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), does not compel another result. Although that case ruled the VWP's no-contest clause inapplicable when "a VWP visitor properly files an adjustment of status application," *id.* at 1035, the court subsequently narrowed that decision to cover only VWP entrants who petition to adjust their status during their lawful 90-day stay, *see Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). Thus, after *Momeni*, a VWP entrant in the Ninth Circuit may contest her removal on the basis of an adjustment-of-status petition filed during her lawful 90-day stay, but as in the other Courts of Appeals, not on the basis of a petition filed after that period. *See Lacey*, 499 F.3d at 519 n.6 (emphasizing that *Freeman* does not apply to adjustment of status petitions filed by VWP overstays). Thus, even if we adopted *Freeman*, that decision would be unavailing to Bradley, who petitioned for an adjustment of status years beyond the expiration of his authorized stay. Consequently, we conclude that Bradley's VWP waiver

forecloses him from contesting his removal via a petition for adjustment of status.[8]

## VI.

For the foregoing reasons, we will deny Bradley's petition for review.

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8. At oral argument and in a supplemental letter to this Court under Rule 28(j) of the Federal Rules of Appellate Procedure, Bradley raised the argument that certain regulations of the Department of State (namely, the so-called "30/60 day rule" found at 9 *Foreign Affairs Manual* 40.63 n.4.7-1 to 4.7-4) render § 1255(c)(4)'s adjustment of status provision a nullity for VWP entrants. This argument did not appear in Bradley's opening brief nor in his reply brief, and we deem it waived. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."); *Lattab v. Ashcroft*, 384 F.3d 8, 17 (1st Cir. 2004) (noting "[t]he usual rule, . . . that new theories cannot be raised in a post-argument Rule 28(j) filing").

## APPENDIX B — ORDER OF REMOVAL FOR DEPORTATION UNDER SECTION 217 OF THE IMMIGRATION & NATIONALITY ACT DATED OCTOBER 18, 2008

## ORDER OF REMOVAL FOR DEPORTATION UNDER SECTION 217 OF THE IMMIGRATION & NATIONALITY ACT

To: BRADLEY, Heathcliffe John
Re: A File #: 87 074 865

Inasmuch as:

1) You are neither a citizen nor a national of the United States, and

2) You are a native of the New Zealand and a citizen of New Zealand, and

3) You were admitted to the United States on or about August 28, 1996 at or near New York, New York under Section 217 of the Immigration and Nationality Act, and you were authorized to remain in the United States for a period not to exceed ninety days, and

4) You have violated the conditions of your admission under Sections 237(a)(1)(B) because you remained in the United States for a longer period of time than authorized by the Attorney General, and

*Appendix B*

5) You have waived your right to contest any action for removal, except to apply for asylum, having applied for admission under Section 217 of the Immigration and Nationality Act.

By virtue of the authority vested in the Attorney General of the United States, and in me as his delegate, by the laws of the United States,

I HEREBY ORDER that you be removed from the United States of America.

s/ Scott A. Weber — 10/18/2008
Scott A. Weber — Date
Field Office Director
US Immigration and Customs Enforcement
Newark Field Office
Newark, New Jersey

## APPENDIX C — NOTICE OF DECISION DATED JUNE 5, 2008

### U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Date: June 5, 2008

Heathcliffe Bradley
19 Crescent Road
West Milford, NJ 07480

File Number: A 087 074 865
Receipt Number: MSC-08-072-19011

### NOTICE OF DECISION

Your Application to Register Permanent Residence or Adjust Status (Form 1-485), pursuant to section 245 of the Immigration and Nationality Act (the Act), is denied for the reasons stated in the attached decision.

USCIS is not initiating removal procedures against you at this time. The decision resulting in the denial of Form 1-485, leaves you without lawful immigration status and you are now present in the United States in violation of the law. You are required to depart the United States within thirty (30) days from the date of this decision, or be subject to removal proceedings. Remaining in the United States beyond this time will also affect your ability to return to the United States. Also, as of the date of this notice, any employment authorization

and/or travel documents previously granted to you based on the pendency of your application are hereby revoked.

s/ Kimberly Zallotti
Kimberly Zallotti
Field Office Director

*Appendix C*

ATTACHMENT

Petitioner: Cheryl Losee
Petition for Alien Relative, Form 1-130
Alien Number (Beneficiary): A 087 074 865
Receipt Number: MSC-08-050-12291

PROCEDURAL HISTORY

On December 11, 2007, you filed a Petition for Alien Relative on behalf of Heathcliffe Bradley. The petition, filed by a United States citizen or lawful permanent resident, seeks to confer the benefits of Section 201(b) of the Immigration and Naturalization Act (the Act) upon the beneficiary.

APPLICABLE LAW AND DISCUSSION

Title 8, Code of Federal Regulations, Part 103.2(b)(13) states in part:

> (ii) *Failure to appear far biometrics capture, interview or other required in-person process.* Except as provided in 8 CFR 335.6, if USCIS requires an individual to appear for biometrics capture, an interview, or other required in-person process but the person does not appear, the application or petition shall be considered abandoned and denied unless by the appointment time USCIS has received a change of address or rescheduling request that the agency concludes warrants excusing the failure to appear.

*Appendix C*

You were first scheduled to appear for an interview on March 26, 2008. That interview was adjourned at your request. On April 9, 2008 you were notified in writing to appear for an interview on May 29, 2008, at the USCIS Newark Field Office. You failed to appear for the interview as scheduled. A request to reschedule your interview was received on May 02, 2008; however the request has been denied because you failed to show good cause for your failure to appear.

CONCLUSION

Accordingly, the visa petition you filed on behalf of Heathcliffe Bradley is deemed abandoned and denied pursuant to 8 CFR §103.2(b)(13).

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED JUNE 21, 2010

### UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4184

HEATHCLIFFE JOHN BRADLEY,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Review of an Administrative Order of Removal of the Department of Homeland Security Ordering Removal pursuant to 8 U.S.C. § 1187 (A87-074-865)

Before: McKEE, *Chief Judge,* SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE and ALDISERT*, *Circuit Judges.*

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* Vote limited to panel rehearing

*Appendix D*

## SUR PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

The petition for rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is hereby **DENIED.**

BY THE COURT:

/s/ **Ruggero J. Aldisert**
Circuit Judge

Dated: June 21, 2010